Supreme Court, U.S.

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No. 99-

IN THE

Supreme Court of the United States

HERBERT McKINNEY and HUBERT McKINNEY,

Petitioners,

v.

UNITED STATES DEPARTMENT OF LABOR, Secretary,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. If a federal employee seeking administrative redress for unlawful employment practices against the employing agency files a charge with the office of inspector general instead of the office of special counsel is that sufficient to estop the successful use of the defense of failure to exhaust administrative remedies?

2. Is the determination as to the connection of an employee's disclosure of employer enforcement violations to a reporting agency and subsequent adverse employment action against said employee a matter more properly reserved for trial?

3. If so, is the question of the actual motive of the employer a question for the jury?

4. Did the Circuit Court of Appeals err by refusing to remand this matter to the district court for the consideration of after discovered evidence that was outcome determinative of the exhaustion defense raised by the agency?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	v
Opinions Below	1
Statement of Jurisdiction	1
Statutes Involved	1
Statement of the Case	5
Reasons for Granting the Writ	7
I. Whistleblower Protection Act	7
II. Vocational Rehabilitation Claim	8
III. Time Period For Filing Charge	8
IV. Appropriateness Of Summary Judgment	9
V. Denial Of Motion To Remand	10
Conclusion	11

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) 10

Celotex Corporation v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) 9

Cleveland v. Policy Management Systems Corporation, 526 U.S. 795 (1999) 9

Lytle v. Household Manufacturing, Inc., 494 U.S. 545, 108 L. Ed. 2d 504, 110 S. Ct. 1331 (1990) 10

Matsushia Electric Industrial Company v. Zenith Radio Corporation, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1985) 10

Reeves v. Sanderson Plumbing Products, Inc., Case No. 99-536 (June 12, 2000) 9, 10

Zipes v. Trans World Airlines, Inc., 102 S. Ct. 1127, 455 U.S. 385 (1982) 8

Cited Authorities

	Page
Statutes:	
5 U.S.C. § 1201	2, 5
5 U.S.C. § 1211	5
5 U.S.C. § 1212(a)(1)	5
5 U.S.C. § 1212(a)(2)	5
28 U.S.C. § 1254(1)	1
29 U.S.C. § 791	1, 5
P.L. 101-12, § 1, 103 Stat. 16	3

TABLE OF APPENDICES

Page

Appendix A — Per Curiam Opinion Of The United States Court Of Appeals For The Fourth Circuit Dated And Decided March 17, 2000 ... 1a

Appendix B — Order Of The United States District Court For The Southern District Of West Virginia At Beckley Dated And Entered March 25, 1996 ..... 3a

OPINIONS BELOW

The unreported decision of the Court of Appeals, dated March 17, 2000, is set forth in Appendix A. The order of the District Court for the Southern District of West Virginia at Beckley, dated March 25, 1996, is set forth in Appendix B.

STATEMENT OF JURISDICTION

This Court's appellate jurisdiction is found in 28 U.S.C. § 1254(1) in that this is an appeal from a judgment of the Circuit Court of Appeals. The date of the judgment order sought to be reviewed is March 17, 2000.

STATUTES INVOLVED

TITLE 29. LABOR
CHAPTER 16. VOCATIONAL REHABILITATION AND OTHER REHABILITATION SERVICES
RIGHTS AND ADVOCACY

29 U.S.C. § 791

§ 791. *Employment of individuals with disabilities*

> (g) Standards applicable to complaints. The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 42 USC 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 4 USC-12204 and 12210), as such sections relate to employment.

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART II. CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES CHAPTER 12. MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION
SUBCHAPTER I. MERIT SYSTEMS PROTECTION BOARD

5 U.S.C. § 1201

§ 1201. Appointment of members of the Merit Systems Protection Board

The Merit Systems Protection Board is composed of 3 members appointed by the President, by and with the advice and consent of the Senate, not more than 2 of whom may be adherents of the same political party. The members of the Board shall be individuals who, by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the Board. No member of the Board may hold another office or position in the Government of the United States, except as otherwise provided by law or at the direction of the President. The Board shall have an official seal which shall be judicially noticed. The Board shall have its principal office in the District of Columbia and may have field offices in other appropriate locations.

ANCILLARY LAWS AND DIRECTIVES

Short titles:

Act April 10, 1989, P.L. 101-12, § 1, 103 Stat. 16 (effective 90 days after enactment, as provided by § 11 of such Act, which appears as a note to this section), provides: "This Act may be cited as the 'Whistleblower Protection Act of 1989'.". For full classification of such Act, consult USCS Tables volumes.

Other provisions:

"(a) Findings. The Congress finds that —

"(1) Federal employees who make disclosures described in section 2302(b)(8) of title 5, United States Code, serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary Government expenditures;

"(2) protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service; and

"(3) in passing the Civil Service Reform Act of 1978 [For full classification, consult USCS Tables volumes], Congress established the Office of Special Counsel to protect whistleblowers (those individuals who make disclosures described in such section 2302(b)(8)) from reprisal.

"(b) Purpose. The purpose of this Act [For full classification, consult USCS Tables volumes] is to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by —

"(1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and

"(2) establishing —

"(A) that the primary role of the Office of Special Counsel is to protect employees, especially whistleblowers, from prohibited personnel practices;

"(B) that the Office of Special Counsel shall act in the interests of employees who seek assistance from the Office of Special Counsel; and

"(C) that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.".

STATEMENT OF THE CASE

The District Court's jurisdiction was based on the United States as a defendant, the Vocational Rehabilitation Act, 29 U.S.C. § 791 and the Whistleblower Protection Act, 5 U.S.C. § 1201, 5 U.S.C. §§ 1211, 1212(a)(1) and (2).

The McKinneys were career federal mine inspectors with impeccable employment records. The complaint filed in the District Court contained three counts. The first count alleged age discrimination and counts two and three alleged violations of the Vocational Rehabilitation Act and the Whistleblower's Protection Act, respectively. After discovery, the Agency moved the District Court for partial summary judgment as to counts two and three arguing that the McKinneys had a requirement to exhaust their administrative remedies and had failed to do so prior to initiating the District Court action. The McKinneys argued that the Agency should be estopped from asserting the defense in that they had contacted the Office of Inspector General pertaining to the matters asserted in counts two and three of their complaint. Alternatively, the McKinneys argued that any administrative reporting requirements should be waived due to the fact that the Agency's staff was not forthcoming with advice as to the proper procedure to utilize in protecting their interests even though the Agency was on actual notice of the McKinneys concerns regarding the same. The District Court granted partial summary judgment concluding that the McKinneys had a requirement to exhaust administrative remedies prior to initiating the cause of action and that they had done nothing to perfect the same. In essence finding that their conduct of contacting the Office of Inspector General and reporting the relevant events to an assigned investigator, to be insufficient to warrant estopping

the appellee from asserting this defense. The residual count of the complaint, which pertained to Herbert McKinney's claim of age discrimination, was settled with the Agency in May 1998.

After the appeal had been perfected with the Circuit Court of Appeals, the appellants located a copy of the employee handbook that they had seen and relied on in making their determination to contact to Office of Inspector General. A motion was filed by the appellants with the Circuit Court of Appeals seeking a remand to the District Court for a hearing on the provisions of the employee handbook that dealt with the prescribed procedure to address whistleblower and retaliation problems arising in the workplace. The publication is titled "Employee Handbook" and purports on its cover to have been published by the United States Department of Labor, Office of the Assistance Secretary for Administration and Management, Directorate of Personnel Management, Washington, D.C. (1990). At page 39 of the handbook under the highlighted headnote "Whistleblowing", the document in pertinent part reads:

> . . . by Department policy, each employee is required to report information indicating the possible existence of a violation of law, rules, or regulations; conflict of interest; mismanagement; gross waste of funds; abuse of authority; or a substantial danger to the public health and safety. Such information should be conveyed by calling the OIG Hotline on" [a telephone number is provided then an address followed]. ". . . The Inspector General Act of 1978, as amended, protects employees against reprisals for making complaints or disclosing information to the Inspector General."

The Circuit Court of Appeals denied the motion to remand.

On March 17, 2000 the Circuit Court of Appeals issued a per curiam decision affirming the District Court's ruling. Judgment was entered the same date. It is from this judgment that this writ of certiorari is taken.

REASONS FOR GRANTING THE WRIT

I.

WHISTLEBLOWER PROTECTION ACT

Hubert McKinney was directed to inspect a coalmine within his employment district, but under the supervision of another Field Office supervisor. Upon arriving at the mine to complete the inspection, Hubert McKinney became aware that the mine was being operated in full production without an approved ventilation plan. He refused to follow a mandate from the supervisor of the Field Office to ignore the "technical violation", and sign off on the inspection without a citation being issued. Instead he and his brother reported the improper activity of this supervisor and the coal company to the District supervisor. Within days after this disclosure, the Agency confronted the McKinneys with a mandate to retire or be removed from active duty by forced employment action [allegedly due to their lack of physical fitness for duty]. The Agency contended its basis for the threatened forced employment action was that each of the McKinneys had failed their physical examination. The physical examination in question had been performed two years earlier. And, the physical deficiencies noted in the report were ones the appellants possessed, in the same degree, at

their time of hire. Additionally, it is without dispute that neither of the McKinneys had manifested any inability to perform the duties of their positions with the Agency as a result of the noted physical deficiencies.

II.

VOCATIONAL REHABILITATION CLAIM

In response to this sudden threat to their continued employment, the McKinneys requested the personnel office to reassign them to other duties within the Agency as an accommodation. They were told that no such duties existed. However, it is without dispute that other inspectors who had developed physical limiting injuries had in fact been assigned office type duties and that those duties were still required within the office at the time the McKinneys made their request.

III.

TIME PERIOD FOR FILING CHARGE

The contact made by the McKinneys with the Office of Inspector General, in which they disclosed that their superiors were allowing a particular coal company to operate and mine coal, without the required mining permits and plans and that their disclosure of the same was adversely affecting their continued employment with the Agency, was sufficient to indicate deliberate activity in protecting their legal interests regarding the challenged employment conduct to justify the waiver of any filing requirement with the Equal Employment Opportunity Commission. This Court addressed the appropriateness of a Court utilizing the equitable doctrines of estoppel, waiver and tolling of filing periods in just such situations in *Zipes v. Trans World Airlines, Inc.*, 102 S. Ct. 1127, 455 U.S. 385 (1982).

IV.

APPROPRIATENESS OF SUMMARY JUDGMENT

Likewise such conduct, if viewed most favorably to the McKinneys, constituted violations of the Whistleblower Protection Act and the Vocational Rehabilitation Act. This Court has held that in a federal court, summary judgment for a defendant is only appropriate when the plaintiff fails to make a showing sufficient to establish the existence of an element essential to the case and on which the plaintiff will bear the burden of proof at trial. *Reeves v. Sanderson Plumbing Products, Inc.*, Case No. 99-536 (June 12, 2000); *Cleveland v. Policy Management Systems Corporation*, 526 U.S. 795 (1999); *Celotex Corporation v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The Court of Appeals ruling upholds the determination by the District Court that the McKinneys failed to sufficiently establish a connection with the Agency's conduct taking issue with their fitness for duty and their having reported the Agency's condoning of unlawful mining practices by the coal company in their district.

The fact that days separated the McKinneys disclosures of law violations by the Agency and the Agency's threat of forced retirement should have been deemed sufficient of a nexus to survive the Agency's motion for summary judgment. In cases which involve motive and intent, the use of summary judgment should be used with extra caution. For, by the very nature of these types of cases conflicting inferences from available evidence are more likely than not to exist. And, given that the nonmoving party should be afforded the benefit of every favorable inference reasonably reached by the evidence, summary judgment was improper

in this matter. *See Reeves v. Sanderson Plumbing Products, Inc.*, Case No. 99-536 (June 12, 2000). For to determine otherwise, required the Court to engage in weighing the evidence in support of the parties contentions thereby making credibility determinations. Such matters this Court has held are functions for the jury, not the Court. *See also Matsushia Electric Industrial Company v. Zenith Radio Corporation*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1985); *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545, 554-555, 108 L. Ed. 2d 504, 110 S. Ct. 1331 (1990); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Certainly, given the aforementioned status of the record, two inferences could have been reached as to why the Agency was initiating the fitness for duty challenge and one of those inferences would have supported the McKinneys legal claims.

V.

DENIAL OF MOTION TO REMAND

After filing their appeal to the District Court's ruling on summary judgment, the McKinneys were able to obtain a copy of the employee handbook that they had seen a couple of years earlier in the workplace that influenced their decision to seek administrative help from the Office of the Inspector General. It was not disputed by the Agency that the employee handbook specifically provided that in instances of illegal activity and whistle blowing situations, the employee was to contact the Office of Inspector General at the very telephone number used by the McKinneys in filing their charges. A hearing before the District Court would have afforded the McKinneys the opportunity to effectively, if not dispositively, address the insufficiency determined to

exist by the District Court in their conduct in failing to file a charge with the Equal Employment Opportunity Commission. Additionally, this evidence would have been outcome determinative on the inappropriateness of permitting the Agency to successfully assert exhaustion as a defense.

CONCLUSION

For the foregoing reasons, the petitioners respectfully pray that this Court will remand this matter to the District Court with appropriate directions.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED MARCH 17, 2000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2118

HERBERT MCKINNEY; HUBERT MCKINNEY,

Plaintiffs – Appellants,

versus

UNITED STATES DEPARTMENT
OF LABOR, Secretary,

Defendant – Appellee.

Appeal from the United States District Court for the Southern District of West Virginia, at Beckley. Joseph Robert Goodwin, District Judge. (CA-95-160-5)

Submitted: March 7, 2000 Decided: March 17, 2000

Before WILKINS, NIEMEYER, and LUTTIG, Circuit Judges.

* * *

Appendix A

PER CURIAM:

Herbert and Hubert McKinney appeal the district court's order granting partial summary judgment to Defendant. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. *See McKinney v. United States Dep't of Labor*, No. CA-95-160-5 (S.D.W. Va. Mar. 25, 1996). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT BECKLEY DATED AND ENTERED MARCH 25, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT BECKLEY

HERBERT MCKINNEY and
HUBERT MCKINNEY,

Plaintiffs,

v.

ROBERT R. REICH, Secretary, United States Department of Labor,

Defendant.

ORDER

This matter is before the Court on Defendant's Motion for Partial Summary Judgment and Memorandum in Support, Plaintiffs' Response in Opposition to Defendant's Motion for Partial Summary Judgment and Defendant's Reply to Plaintiffs' Response.

FACTS

Plaintiffs Herbert and Hubert McKinney, white males over the age of 40, were employed at all times relevant to this action by the Mine Safety and Health Administration,

an agency headed by Defendant Secretary of the United States Department of Labor. They filed a Complaint in this case alleging three causes of action against Defendant: in Count I that Herbert McKinney was denied a promotion to a supervisory position due to his age; in Count II that Herbert and Hubert McKinney were forced to take premature retirement as a result of their reporting to the District Manager of Defendant's Oak Hill, West Virginia office a violation regarding the alleged illegal operation of a coal mine; and, in Count III that Herbert and Hubert McKinney sustained black lung and hearing loss as a result of their coal mine employment since 1971 and Defendant failed to accommodate them by forcing them to retire prematurely, in violation of the Americans with Disabilities Act.

Defendant filed a motion for summary judgment claiming that Plaintiffs had failed to exhaust their administrative remedies with regard to Counts II and III. Further, Defendant argued in its motion for summary judgment and reply to Plaintiffs' response that, although Plaintiffs cite the Americans with Disabilities Act in Count III of their complaint, the statutory reference made in the complaint in the jurisdictional paragraph, 29 U.S.C. § 633a(a), is the reference to the Age Discrimination in Employment Act. The age discrimination claim, contained in Count I of the complaint is not the subject of Defendant's motion for summary judgment, and Defendant proceeded to address Count III of Plaintiffs' complaint as one under the Vocational Rehabilitation Act due the fact that the American's with Disabilities Act does not apply to Plaintiffs. (Defendant's Reply, p. 2.) Therefore, Plaintiffs initially responded to this argument by stating that their claim was

indeed one asserted under the Americans with Disabilities Act (*see* Plaintiffs' Response, p. 2), but later sought to amend the complaint and assert a violation of the Vocational Rehabilitation Act in Count III. (Plaintiffs' Amendment of Jurisdictional Citation in Their Complaint and Argument in Opposition to Defendant's Motion for Summary Judgment, pp. 1-2.) Defendant did not file a response to this motion to amend by Plaintiffs.

Pursuant to Federal Rule of Civil Procedure 15(a), the Court hereby GRANTS Plaintiffs motion to amend, hearing no objection from Defendant and finding that granting of the same is required in the interests of justice and judicial economy. Accordingly, Count III of Plaintiffs' Complaint will be treated as one alleging violation of the Vocational Rehabilitation Act.[1]

LAW

A. Whistleblower Protection Act

The Whistleblower Protection Act of 1989 ("WPA"), Pub.L. No. 101-12, 103 Sat. 16 (1989) (codified at scattered sections of Title 5, United States Code) was "enacted for the purpose of protecting federal employees who disclose government illegality, waste, and corruption." 5 U.S.C. § 1201. Aiding in the enforcement of the WPA, the Office of Special Counsel protects employees, former employees,

1. In Plaintiffs' motion to amend, they incorrectly refer to Count II, not Count III, as the count containing the claim of discrimination based on disability in violation of the Vocational Rehabilitation Act.

and applicants for employment from prohibited personnel practices and "receive[s] and investigate[s] allegations of prohibited personnel practices[.]" 4 U.S.C. §§ 1211 and 1212(a)(1) & (2).

The powers and functions of the Special Counsel are set out in § 1212 wherein it states that the Special Counsel shall receive and review disclosures of violations of any law, rule, or regulation, or gross mismanagement, as well as, receive and investigate allegations of prohibited personnel practices and bring petitions for stays and corrective action under § 1214. 5 U.S.C. § 1212(a). Section 1221 of Title 5 creates an individual right of action with respect to certain personnel actions (those proscribed in § 2302(b)(8)) which allows an employee to "seek corrective action from the Merit Systems Protection Board." 5 U.S.C. § 1221(a). Title 5 of the Code of Federal Regulations, part 1209, deals directly with practices and procedures of the Merit Systems Protection Board for appeals and stay requests of personnel actions allegedly based on whistleblowing. 5 C.F.R. § 1209.1 *et seq*. Thus, there is established an administrative remedy mechanism for those who believe they have been the victim of prohibited personnel practices, including alleged violations of the WPA.

In *Ellison v. Merit Systems Protection Bd.*, 7 F.3d 1031 (Fed. Cir. 1993), the court determined whether an employee had demonstrated by a preponderance of the evidence a case of reprisal for whistleblowing under the Whistleblower Protection Act. In its analysis of the sufficiency of the complaint, the court explained the statutory scheme of the WPA:

> if the personnel action challenged by the employee is not otherwise directly appealable to the Board (the Merit Systems Protection Board), the employee must first seek corrective action from the OSC (Office of Special Counsel). 5 U.S.C. §§ 1214(a)(3), 1221(a), (b). Only after the OSC has notified the employee that its investigation has been terminated, 5 U.S.C. § 1214(a)(3)(A)(i), (ii), or if no action has been taken by the OSC within 120 days, 5 U.S.C. § 1214(3)(B), may the employee seek corrective action from the Board. Not until the employee has exhausted this mandatory procedural route may he or she be entitled to file an IRA appeal under section 1221 to the Board. *See, Knollenberg v. Merit Sys. Protection Bd.*, 953 F.2d 623, 625-26 (Fed. Cir. 1992).

Ellison, at 1035-36. The pitfall of the complainant/employee in that case was that he failed to show entitlement to corrective action in that he failed to provide a factual foundation to the OSC sufficient to support his charge of reprisal by a government agency in violation of his rights under the WPA. *Id.* at 1036. Thus, the court explained the necessary steps and necessary factual proof for an alleged violation of the WPA. Discussion of those steps and proof revealed a clear and mandatory administrative remedy procedure which any employee claiming a WPA violation must follow.

Similarly, in *Knollenberg v. Merit Systems Protection Bd.*, 953 F.2d 623 (Fed. Cir. 1992), the court explained that

before an employee can file an individual right of action with the Merit Systems Protection Board, he first must exhaust the requirement of seeking corrective action from the Special Counsel, except in a case as described in § 1221(a).

B. Rehabilitation Act

The Vocational and Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.* ("Rehabilitation Act") affords individuals a private right of action for violations of its provisions and in so doing "expressly incorporates the 'remedies, procedures and rights' of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16. *See*, 29 U.S.C. § 794a(1)." *Plowman v. Cheney*, 714 F.Supp. 196, 198 (E.D.Va. 1989). "Among these Title VII remedies and procedures is an administrative claims procedure that is a prerequisite for seeking a judicial remedy." *Id.* The applicable EEOC regulations provide that "the agency may accept the complaint for processing . . . only if:

> (i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him/her to believe he/she had been discriminated against within 30 calendar days of the date of the alleged discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action; and (ii) The complainant or representative submitted the written complaint to an appropriate official within 15 calendar days

> after the date of receipt of the notice of the right to file a complaint.

29 C.F.R. § 1613.214(a). There are limited circumstances in which the 30-day period may be extended, as explained in 29 C.F.R. § 1613.214(a)(4):

> The agency shall extend the time limits in this section when the complainant shows that he/she was not notified of the time limits and was not otherwise aware of them, was prevented by circumstances beyond the complainant's control from submitting the matter within the time limits; or for other reasons considered sufficient by the agency.

29 C.F.R. § 1613.214(a)(4). However, nothing in this section relieves a complainant from filing the administrative complaint altogether, it simply extends the time in which the same may be filed.

Thus, the above-outlined Title VII procedures require the initiation of an administrative complaint, and federal employees must comply with the EEOC regulations before a suit may be filed. *Plowman*, at 199 (citing *Young v. National Center for Health Services*, 828 F.2d 235, 237 (4th Cir. 1987); *Zografov v. V.A. Medical Center*, 779 F.2d 967, 969-70 (4th Cir. 1985); *Woodard v. Lehman*, 717 F.2d 909, 914 (4th Cir. 1983)).

Appendix B

ANALYSIS

A. WPA claim

From the statutes, regulations and case law, it is clear that in order to seek redress for actions allegedly in violation of the WPA, a grievant must seek redress from the Office of Special Counsel first, except in those cases where he or she is statutorily entitled to file an individual right of action with the Merit Systems Protection Board. In the case at hand, it is undisputed that Plaintiffs neither filed a complaint with the Office of Special Counsel or the Merit Systems Protection Board. In fact, they failed to invoke or engage in any sort of administrative remedy exhaustion before filing a claim in district court.

In their response in opposition to Defendant's motion for summary judgment based on this failure to exhaust administrative remedies, Plaintiffs broadly assert that estoppel and waiver are applicable to their cause of action under the WPA without specifically explaining how those doctrines apply to this case. More importantly, Plaintiffs fail to explain why they *never* sought redress from the OSC or the MSPB but, instead, came directly to district court. Without more specific facts supporting Plaintiffs' claims that estoppel and waiver should relieve them of the requirement to file administrative claims, the Court is unable to find there exists an issue of material fact to defeat Defendant's motion for summary judgment. As Defendant states in its motion, Plaintiffs "failed to exhaust, or to even exercise, their administrative remedies." (Def's Motion for Summary Judgment, p. 5.)

For these reasons, the Court finds that Plaintiffs failed to exhaust their administrative remedies available under the WPA and failed to present any facts supporting a claim of estoppel or waiver justifying the failure to exhaust administrative remedies. Accordingly, IT IS ORDERED that Defendant's motion for summary judgment on Count II is GRANTED.

B. Rehabilitation Act claim

Plaintiffs in this case were required to file a complaint of discrimination with the agency within thirty days of the effective date of the alleged discriminatory personnel action they claim violated the Rehabilitation Act. 29 C.F.R. § 1613.214(a)(1)(i). This 30-day period would have been extended had Plaintiffs shown that they were neither notified of the time limit nor otherwise aware of it. 29 C.F.R. § 1613.214(a)(4). Instead of filing any sort of administrative complaints, however, be it a late filing or a defective pleading, Plaintiffs proceeded to obtain counsel and file a federal lawsuit.

In essence, Plaintiffs are asking this Court to *waive* the requirement that they exhaust their administrative remedies due to the behavior of Defendant. Specifically, Plaintiffs argue that they "have met their requirements to exhaust administrative remedies prior to the initiation of a civil action and if the Court is of the opinion the same has not been met the acts of the Defendant constitute a waiver of the same." (Plaintiffs' Response, p. 2.)

First, Plaintiffs acknowledge that an action under the WPA is subject to the provisions governing Title VII actions,

but state that those provisions are not jurisdictional, but rather serve as a statute of limitations. (Plaintiffs' Response, p. 2.) Then, Plaintiffs engage in a discussion of equitable tolling and argue that when a plaintiff has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing of a deadline to pass, equitable tolling should apply. (Plaintiffs' Response, pp. 2-3.)

In support of their argument, Plaintiffs cite *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990). While that case does hold that equitable tolling is applicable to suits against the government, it cautioned that such equitable relief has been extended sparingly. *Id.* at 457. Further, the Court stated that it has "generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Id.* at 458.

In the instant case, Plaintiffs do not argue that they filed a defective claim under the Act, nor do they claim they were tricked or induced by Defendant's conduct into allowing the filing deadline to pass. What Plaintiffs do argue is that Plaintiff Herbert McKinney "timely filed an age discrimination complaint with the Equal Employment Opportunity Commission regarding the promotion that he did not receive during his tenure with the Defendant." (Plaintiffs' Response, p. 3.) However, this is, on its face, insufficient to put the agency on notice of a claim under the Rehabilitation Act. Next, Plaintiff Hubert McKinney appears to be arguing that he thought he had spoken to an EEOC counselor, but at the same time asserts that he attempted to

protect his "judicial rights through federal resources outside the agency." The Court finds this mistake on the part of Hubert McKinney of speaking to someone whom he believed to be an EEOC counselor does not equate to trickery by the agency or defective pleading practices. Further, Plaintiffs' admission that they went outside the agency in an attempt to protect their judicial rights similarly does not support an application of equitable tolling. More importantly, Plaintiffs *never* filed an administrative claim, thus any argument regarding the tolling of a period of time in which to file an administrative claim is moot.

Plaintiffs simply failed to take the required administrative steps in filing their complaints as admitted in their Response at page 5. Thus, the Court is unable to find any facts which support the application of the doctrine of equitable tolling in this case.

As for Plaintiffs' alternative argument that Defendant should be estopped from asserting that Plaintiffs failed to exhaust their administrative remedies, it too fails due to the lack of factual support. Plaintiffs argue that they were unable to seek alternative physical examinations that would tend to mitigate the deficiencies noted in the initial report because of Defendant's conduct. This assertion in no way explains why Plaintiffs did not file an administrative claim regarding the alleged violation of the Rehabilitation Act, nor does it present a case wherein Defendant should be estopped from asserting failure to exhaust administrative remedies.

For these reasons, the Court finds that Plaintiffs failed to exhaust their administrative remedies available under the

Rehabilitation Act. Accordingly, IT IS ORDERED that Defendant's motion for summary judgment on Count III is GRANTED.

The Clerk is directed to send a copy of this Order to all counsel of record.

IT IS SO ORDERED this 25th day of March, 1996.

ENTER:

s/ Elizabeth V. Hallanan
ELIZABETH V. HALLANAN
United States District Judge